

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

D&S VENTURES and DEREK HOYTE,

Petitioner

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, and
CLARK COUNTY, STATE OF
WASHINGTON,

Respondents.

SHB No. 05-031

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER

Petitioners D&S Ventures and Derek Hoyte (Petitioner Hoyte) filed a Petition for Review with the Shorelines Hearings Board (Board) challenging Clark County's denial of a shoreline variance to construct a residence and associated structures within the 100-foot setback adjacent to the Washougal River in the Conservancy Environment as defined by the Clark County Shoreline Master Program (CCSMP). The Board conducted a hearing on April 27 and 28, 2006 in Camas, Washington. The Board was comprised of William H. Lynch, Chair, and Kathleen D. Mix, Andrea McNamara Doyle, Judy Wilson, Dan Smalley, and Gordon F. Crandall, members.

Petitioners D & S Ventures and Derek Hoyte were represented by Attorney James Sellers, Sellers Law Office. Deputy Prosecuting Attorney Christopher Horne represented Respondent Clark County, and Assistant Attorney General Tom Young represented Respondent Department of Ecology.

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER
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Randi R. Hamilton of Gene Barker & Associates, Inc. provided court-reporting services. On the first day of the hearing, the Board conducted a site visit with all parties present. The Board also received sworn testimony of witnesses, exhibits, and argument on behalf of the parties. Having fully considered the record, the Board enters the following:

I. FINDINGS OF FACT

[1]

Petitioner Hoyte owns an irregularly shaped five-acre parcel of land in Clark County on the east bank of the Washougal River. *Testimony of Derek Hoyte; Ex. R-9, Ex. A-42.* He proposes to build a two story residence for his personal use on this property. The proposed residence would consist of up to 5,000 square feet of living space, including a daylight basement, within a footprint of 4,000-5,000 square feet. The proposed project also includes a patio, a deck, a three-car garage on a concrete slab, a driveway over fill with drainage infrastructure, a parking area, and surrounding landscaped areas. *Testimony of Hoyte.*

[2]

The proposed development is located in Clark County's R-5 residential zone along the eastern side of the Washougal River, approximately one mile north of State Highway 14 and just outside Washougal's urban growth boundary. The current use of the property is bare land. Adjoining parcels are in residential use or are also bare land. The land is classified in the CCSMP as Shoreline Conservancy Environment, a classification for shorelands of sparse, scattered settlements, existing relatively free of urban activity, intolerant of intensive land uses,

1 and used for limited identified purposes. *Ex. A-44; Ex. R-25*. Single family residences are
2 permitted uses within the Conservancy Environment. *CCSMP Conservancy Environment, Use*
3 *Limitations, 1*. "...but the setback may vary with steepness of terrain, soil conditions, geologic
4 factors, road locations, lot size and configuration and visual amenities." *CCSMP Chapter VI,*
5 *Residential Development, A.6*. General policies within the Conservancy Environment favor uses
6 that are non-consumptive of the physical and biological resources of the area and that maintain
7 the aesthetic character of the area. Density of residential development in the Conservancy
8 Environment should be minimal. *CCSMP, Conservancy Environment, D, General. Policies, 1, 2*
9 *and 4*.

10 [3]

11 Petitioner Hoyte's five-acre, undeveloped parcel is now covered primarily by an upland
12 mixture of coniferous/deciduous forest except for a small grassy meadow near the center of the
13 site. Within upland areas that are not forested, large infestations of Japanese knotweed are
14 occurring along with thickets of blackberries. The project site contains one 6,028 square foot
15 delineated wetland associated with seasonal seeps which enter a swale that in turn drains towards
16 the Washougal river along the west side of the parcel. *Testimony of Kim Van Zwahlenburg; Ex. R-*
17 *20*.

18 [4]

19 The property has a topography consisting of a bench, slope-bench type configuration. In
20 general, the property slopes gently to steeply downward from the southeast to the northwest and
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1 is characterized by steep slopes with gradients from approximately 65% to 100%. The site
2 encompasses areas of potential instability and areas of historic and potentially active landslides.
3 Landslides have been active across the property. The east slope is characterized by areas of
4 severe erosion hazard. The steeper sides of the parcel have ancient slide areas of localized
5 slumping and, although these slopes are not currently active, there are areas of slope instability at
6 this time. *Ex. R-4; Ex. R-7; Ex. R-10; Testimony of Donald Bruno.*

7 [5]

8 The currently proposed building site is generally located on a bench adjacent to the
9 Washougal River on a north-south trending knoll located approximately sixty feet east of the
10 river. The knoll sits between the east slope and another steep slope running down to the shore on
11 the west. *Ex. R-1, sheet 3 of 7.*

12 [6]

13 The Washougal River 100 foot shoreline setback, like other shoreline setback systems,
14 helps to protect both property owners and the river system resource. The setback affords
15 shoreline property owners protection from erosion, river changes, and unstable slopes for uses
16 and activities that go on in the upland. It also protects the ecology of the shoreline and
17 waterbody. *Testimony of Van Zwahlenburg.*

18 [7]

19 Clark County's Geologic Hazards ordinance requires a minimum of a 50 foot setback
20 from the top and bottom of slopes in landslide hazard areas in order to mitigate a steep slope or
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erosion hazard and to protect the public health, safety, and welfare. *Ex. R-17; Clark County Code 13.60.330.*

[8]

All parties have acknowledged that the subject property is a complicated one for building due to the many site-specific constraints resulting from the natural features of the property. *Testimony of Hoyte; Testimony of Terri Brooks; Testimony of Van Zwahlenburg.* Although the property has constraints, Ecology and the County both acknowledge that it appears to have areas where a house could be built. *Testimony of Van Zwahlenburg; Testimony of Brooks; Ex. R-26; Ex. R-28.* The County stated, in its denial of the variance, that it is not unreasonable to construct a residence with a 2,500+ square foot footprint, but not one of the size and configuration proposed by Mr. Hoyte. *Ex. R-26, p. 9.*

[9]

Petitioner Hoyte is a professional developer who has built in Clark County before. He is generally familiar with Clark County development requirements and knew that building near the shoreline would involve additional regulations such as shoreline permits. At the time of purchase, he recognized there would be challenges to development of the property, given its location and topography. Petitioner Hoyte initially expected the building site to be located on the southwest (or “upper”) portion of the property, near the end of the existing driveway. He originally submitted a development application for that location. As part of his development application, Petitioner Hoyte applied to Clark County for a variance from the required 100 foot

1 shoreline setback from the ordinary high water mark of the Washougal River. *Testimony of*
2 *Hoyte, Ex. A-32.* This initial application was later revised after geotechnical review
3 recommended against that upper location due to soil types and river action at the toe of the slope
4 immediately west of the site. *Testimony of Hoyte; Testimony of Bruno.*

5 [10]

6 During the development application process, Petitioner Hoyte attempted to reconfigure
7 the boundaries of the subject property through a series of boundary line adjustment requests with
8 adjoining property that he owned at the time. The purpose of the boundary line adjustment
9 requests was to achieve a building envelope. *Testimony of Hoyte, Ex. R-8.* Clark County
10 ultimately granted and recorded Petitioner Hoyte's boundary line adjustment which created two
11 re-configured 5.0 acre lots, both undeveloped. *Testimony of Brooks.* Petitioner Hoyte
12 subsequently submitted a different development proposal to fit within the area on the knoll
13 recommended by his geotechnical engineering consultant. *Testimony of Hoyte. Testimony of*
14 *Bruno.* Petitioner Hoyte has now sold the other re-configured 5-acre lot to the north of the
15 subject property. *Testimony of Hoyte.*

16 [11]

17 Throughout the course of the development application process, Petitioner Hoyte
18 submitted drawings and plans for the project with multiple configurations at different locations
19 on the property. *Testimony of Brooks.* Clark County staff requested clarification about the
20 differing plans and the placement of the proposed residence on the lot in relation to the 100 foot
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1 shoreline setback. The County also requested technical assistance from the Department of
2 Ecology in establishing the ordinary high water mark and evaluating other aspects of the
3 proposal. As part of that assistance, Ecology staff made two site visits to the property. Through
4 these site visits, Ecology identified a preliminary ordinary high water mark, which was later re-
5 set and flagged further upland on the second site visit in the spring of 2006. *Testimony of Van*
6 *Zwalenburg.*

7 [12]

8 At various points during the application review process, the County planner requested
9 Petitioner Hoyte to provide testing and geotechnical analytical information about other possible
10 locations for the residence on the parcel, including the upper portion, that would reduce or
11 eliminate the need for construction within the shoreline setback. The County planner also
12 requested that Petitioner Hoyte conduct a slope stability analysis of the entire site. *Testimony of*
13 *Brooks; R-17.*

14 [13]

15 Petitioner Hoyte's engineering geologist utilized five exploration test pits to investigate
16 the sub-surface site conditions on the five-acre parcel in order to locate a safe and suitable
17 building site. Based on initial visual inspections of the property, he concentrated his explorations
18 on the knoll area of the site. Data from the five test pits led engineers to conclude that the knoll
19 area was the most suitable and safe building site because of widespread landslide material,
20 unstable soils subject to liquefaction, and slope instability at several other locations on the bench
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1 area of the five acres, including the upper area of the property. All five test pits are located in the
2 vicinity of Petitioner Hoyte's proposed location for the residence. *Ex. A-43.*

3 [14]

4 Written explanations of the test pit results and the engineering geologist's conclusions
5 about the location of a suitable building zone were submitted to the County in the form of a
6 Geotechnical Engineering Study and at least three addendum letters. *Testimony of Bruno, Ex. R-*
7 *4; R-10; R-13; R-18; A-43.* However, no exploration test pit or other scientific geotechnical
8 testing evidence was presented to the County, or to the Board at the hearing, evaluating the
9 suitability of alternate locations on the lot for Petitioner Hoyte's residence.

10 [15]

11 Extensive excavation and grading will be necessary to build the proposed residence, the
12 driveway, and the accompanying structures and grounds in the area of the knoll. The existing
13 knoll at the building site would be reduced from an elevation of 110 feet to 84 feet in order to
14 create an adequate site for the proposed home's large footprint and daylight basement. *Ex R-1,*
15 *Sheet 3 of 7; Testimony of James.* The residence construction would require from three to six
16 feet of foundation excavation. The septic, utilities, and drainfields would also require grading,
17 and the slope east of the home site would be re-graded to accommodate the 12-foot wide gravel
18 driveway. A total of 8,463 cubic yards of material would be excavated from the knoll and used
19 as fill material across the adjacent meadow and wetland area for the driveway. *Testimony of*
20 *Hoyte; Testimony of James.* The top six to twelve inches of topsoil would be removed from the

1 meadow area and stockpiled while the meadow area is graded for landscaping. The topsoil
2 would then be spread out over the meadow, and 1,758 square feet of the wetland, and
3 hydroseeded. The total footprint of the yard area is estimated to be approximately 20,000 square
4 feet. *Testimony of James, Ex. R-1. Sheet 3 of 7.* The driveway, located mostly outside of the
5 shoreline set-back area, would be cleared of all vegetation and then graded to cut into the toe of
6 the slope. Drainpipe, interceptor drains, and additional reinforcement would be placed under and
7 against the slope for drainage and stability purposes. *Testimony of James; Ex. R-1, Sheet 4.*

8 **[16]**

9 The Washougal River, which is a shoreline of state-wide significance, borders the entire
10 west side of the property. *Testimony of Van Zwahlenburg, Ex. A-7, Ex. A-45.* For purposes of the
11 Clark County Habitat Conservation Ordinance (HCO), the Washougal River is a Type 1
12 watercourse, which requires a 250-foot riparian Habitat Conservation Zone in order to protect
13 fish and wildlife habitat. The term “riparian area” means the area adjacent to aquatic systems
14 with flowing water that contain elements of both aquatic and terrestrial ecosystems which
15 mutually influence each other.

16 **[17]**

17 The Washougal River contains several threatened or endangered salmonid species. It
18 supports populations of fall chinook, summer and winter steelhead, chum and coho salmon.
19 Chinook, steelhead and chum are listed as threatened under the federal Endangered Species Act,
20 and coho salmon are a candidate for listing. The health and viability of these populations in the
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1 region is currently low to moderate, except for coho, which is very low. The recently adopted
2 Lower Columbia Salmon and Steelhead Recovery and Sub-Basin Plan identified the Washougal
3 River as key in the recovery of these salmonid populations. Destruction of riparian habitat and
4 residential conversions in the lower watershed are identified as key factors limiting recovery of
5 these populations. *Ex. R-15*. Cumulative loss of shade, woody debris recruitment, nutrient
6 replacement and slope instability in the riparian zone along this part of the Washougal River are
7 seen as key factors that will affect the survivability of salmonid species. *Testimony of Manlow*.
8 Because of the sensitivity of this riparian habitat area, Petitioner Hoyte was informed by the
9 County's Habitat Biologist that higher mitigation standards would apply and that, although the
10 HCO does not preclude single-family residences, it may be applied to limit the proposed location
11 of structures and the proposed removal of vegetation. *Ex. R-5; Testimony of Howe*.

12 **[18]**

13 The Washington Department of Fish and Wildlife (WDFW) provided written comments
14 to the County in January, 2005, to the effect that Petitioner Hoyte's proposal would adversely
15 affect the health of the riparian habitat and listed fish populations in the Washougal River.
16 WDFW also expressed concerns that the project's original inclusion of a proposed swimming
17 pool within 50 feet of the ordinary high water mark was clearly not designed to minimize
18 impacts to the sensitive areas. *Ex. R-15*.

1 [19]

2 Just prior to the hearing, Petitioner Hoyte's engineering geologist hand drew an
3 unmeasured cloud-shaped oval area on the site map based on his surface observations of the site.
4 He identified this as the best building location in his professional opinion. This was the location
5 on the site within which Petitioner Hoyte has proposed to build his residence and for which the
6 variance had been denied by Clark County. *Testimony of Bruno. Ex A-43, sheet 3 of 7.* Also
7 very shortly before the hearing, the County identified possible building envelopes that could be
8 fit between the revised ordinary high water mark and the toe of the east slope. *Ex. R-27;*
9 *Testimony of Brooks.* Despite testimony from a number of witnesses at the hearing, no one
10 witness or exhibit was able to precisely identify where the residence building envelope was on
11 Petitioner Hoyte's five acre site in relation to the revised 100 foot shoreline setback.

12 [20]

13 Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.
14

15 FROM THE ABOVE FINDINGS OF FACT, THE BOARD MAKES THESE

16 **I. CONCLUSIONS OF LAW**

17 [1]

18 The Board has jurisdiction over the subject matter and the parties. RCW 90.58.180. The
19 Board's review of shoreline decisions is *de novo* and without deference to the decision of the
20
21

1 local government. WAC 461-08-500(1). *McArthur v. City of Long Beach*, SHB Case No. 03-
2 017 (2003).

3 [2]

4 Petitioner Hoyte, having appealed the County's denial of the shoreline variance permit,
5 bears the burden of proof before this Board. RCW 90.58.140(7).

6 [3]

7 The Shoreline Management Act (SMA) must be liberally construed to give full effect to
8 the objectives and purposes for which it was enacted. RCW 90.58.900; *Samuel's Furniture, Inc.*,
9 147 Wn.2d 440, 448, 54 P.3d 1194 (2002); *Clam Shacks v. Skagit County*, 109 Wn.2d 91, 93,
10 743 P.2d 265 (1987).

11 [4]

12 The SMA was enacted to protect and manage the shorelines of Washington State to foster
13 all reasonable and appropriate uses. "Permitted uses in the shorelines of the state shall be
14 designed and conducted in a manner to minimize, insofar as practical, any resultant damage to
15 the ecology and environment of the shoreline area and any interference with the public's use of
16 the water." RCW 90.58.020. A permit for development on the shoreline may be granted only
17 when the development is consistent with the applicable master program and the provisions of the
18 SMA. *Buechel v. Ecology*, 125 Wn.2d 196, 204, 998 P.2d 910 (1994).

1 [5]

2 The CCSMP implements and incorporates the policies of the state SMA and applies to
3 the Washougal River, which is a shoreline of statewide significance. CCSMP Chapter II.
4 Shorelines of state-wide significance must be managed in a manner that recognizes and protects
5 the state-wide interest, including the protection of the natural character of the shoreline, the long-
6 term over short-term benefit, protection of the resources and ecology of the shoreline. CCSMP
7 Chapter II.

8 [6]

9 Petitioner Hoyte's proposal to construct a single-family residence and appurtenant
10 structures in the "Conservancy Environment" is properly classified as a substantial development
11 since it is not exempted from the shoreline code requirements, exceeds a total cost of \$5,000, and
12 materially interferes with the normal public use of the water or shoreline of the state. CCMP
13 Chapter II.

14 [7]

15 Clark County has adopted the variance criteria set forth in the Washington Administrative
16 Code (WAC). Shoreline variances may be used to allow projects to deviate from the
17 dimensional standards of the applicable Shoreline Master Program in exceptional circumstances
18 that constitute particular hardships to property owners. "The purpose of a variance permit is
19 strictly limited to granting relief from specific bulk, dimensional or performance standards set
20 forth in the applicable master program where there are extraordinary circumstances relating to

1 the physical character or configuration of property such that the strict implementation of the
2 master program will impose unnecessary hardships on the applicant or thwart the policies set
3 forth in RCW 90.58.020.” WAC 173-27-170(1).

4 [8]

5 Variances are, in effect, exemptions from statutory or regulatory requirements. Such
6 exemptions are to be narrowly construed in order to give maximum effect to the policy
7 underlying the general rule. *Brunner v. Skagit County, SHB 00-012 (2000); Yakima v.*
8 *Firefighters, 117 Wn. 2d 655, 818 P.2d 1076 (1991).* Exceptions to the 100-foot shoreline
9 setback from the ordinary high water mark must be strictly construed as exceptions to the SMA
10 and its stated purposes. Any variance from an approved master program is to be allowed only if
11 “extraordinary circumstances are shown and the public interest suffers no substantial detrimental
12 effect.” RCW 90.58.100(5); WAC 173-27-170(1); *Buechel, 125 Wn.2d at 205; Weston v. San*
13 *Juan County, SHB 01-031 (2002).* To meet the high standard for the granting of a variance, a
14 party bears the burden of showing that all of the criteria in WAC 173-27-170 (2) have been met.
15 *Garrett v. Ecology, SHB 03-031 and 03-032 (2005).*

16 [9]

17 Clark County has adopted all six of the State standards for granting variances set forth in
18 WAC 173-227-170(2). In order to obtain a variance, Petitioner Hoyte must demonstrate all of
19 the following:
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1 (a) That the strict application of the bulk, dimensional or performance standards
2 set forth in the applicable master program precludes, or significantly interferes
with, reasonable use of the property;

3 (b) That the hardship described in (a) of this subsection is specifically related to
4 the property, and is the result of unique conditions such as irregular lot shape,
size, or natural features and the application of the master program, and not, for
example, from deed restrictions or the applicant's own actions;

5 (c) That the design of the project is compatible with other authorized uses within
6 the area and with uses planned for the area under the comprehensive plan and
shoreline master program and will not cause adverse impacts to the shoreline
7 environment;

8 (d) That the variance will not constitute a grant of special privilege not enjoyed by
the other properties in the area;

9 (e) That the variance requested is the minimum necessary to afford relief; and

10 (f) That the public interest will suffer no substantial detrimental effect.

11 WAC 173-27-170(2).

12 **[10]**

13 Petitioner Hoyte contends that, without the variance, he will not have reasonable use of
14 his property. The Washington Supreme court has determined that reasonable use of property
15 must be analyzed with reference to an owner's "investment backed expectations." *Guimont v.*
16 *Clark*, 121 Wn 2d 586, 604, 854 P.2d 1 (1993). If there are existing land use regulations in place
17 at the time a landowner purchases property that limit the permissible uses of it, a purchaser
18 usually cannot reasonably expect to use the land for prohibited purposes. *Buechel v. Ecology*,
19 125 Wn.2d 196, 209, 884 P.2d 910 (1994).

1 [11]

2 Petitioner Hoyte is an experienced property developer who was aware of the challenging
3 nature of the constrained site he was purchasing. He understood that Clark County shoreline
4 development restrictions were in place at the time he acquired his property. While he has
5 invested in this property with the hope of building a substantial residence, it does not follow that
6 such an expectation reasonably includes the right to completely reconfigure substantial portions
7 of sensitive land within the shoreline setback of the Washougal River's Conservancy
8 Environment in order to place a 5,000 square foot home and expansive associated structures.

9 [12]

10 In order to obtain a variance, Petitioner Hoyte must show extraordinary circumstances
11 and no substantial detrimental effect to the public interest, as well as satisfy all of the variance
12 criteria required under the CCSMP and the SMA. We conclude he has not done so. We are not
13 satisfied that Petitioner Hoyte's proposal is the minimum necessary to afford relief as required by
14 WAC 173-27-170(2)(e). The 'minimum necessary' criteria have two aspects. First, the
15 applicant must demonstrate that placing the structures within the shoreline setback is, in fact,
16 necessary to make reasonable use of the property; and second, the applicant must demonstrate
17 that the proposal is the minimum that would provide a property owner reasonable use of the
18 property. We will address each aspect in turn.

1 [13]

2 Although Petitioner Hoyte's engineering geologist concluded that the cloud-shaped oval
3 area on the knoll is the only safe area to support a structure on the entire five-acre parcel, in the
4 absence of testing data or more detailed analysis, the Board does not find these conclusory
5 statements a sufficient basis to rule out the upper site. Additionally, even within the knoll area,
6 the Board concludes that the County has demonstrated that placement of a suitable building
7 envelope may be possible between the adjusted ordinary high water mark and the toe of the east
8 slope (which is also subject to a set back requirement). To justify a shoreline variance, it must
9 first be established that it is not possible to place a reasonable use outside the shoreline setback.
10 Because evidence about the remainder of the site was not as complete or detailed as the evidence
11 presented about the desired site, Petitioner Hoyte has not met his burden as to the necessity of a
12 variance in the first place.

13 [14]

14 The second aspect of the variance criteria of WAC 173-27-170(2)(e) is whether the
15 proposal is the minimum that would provide a property owner reasonable use of his property.
16 The Petitioner's proposal for a house with a 4,000 to 5,000 square foot footprint plus a three-car
17 garage and parking area, patio, deck, and landscaped area that will collectively require the
18 excavation of 8,483 cubic yards of material from the knoll, constitutes extensive intrusion into
19 the sensitive shoreline setback. While it is possible that a more modest or redesigned structure
20 could be built on this site, consistent with the shoreline setback requirements, the current
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1 proposal is not the minimum necessary to afford Petitioner Hoyte with reasonable use of his
2 property. The Board concludes that it has not been designed as is required by the SMA, the
3 CCSMP, and the HCO to minimize damage to the ecology and environment of the shoreline area
4 of the Washougal River, the Conservancy Environment, and the riparian Habitat Conservation
5 Zone.

6 **[15]**

7 A variance may not be granted if any one of the variance criteria set forth in WAC 173-
8 27-170(2) is not established. Having determined that Petitioner Hoyte has failed to meet his
9 burden of proof on the ‘minimum necessary’ criteria, the Board does not address the remaining
10 variance criteria. The Board does not conclude that a variance would never be proper at this site.
11 Although Petitioner Hoyte has failed to meet the ‘minimum necessary’ criteria of WAC 173-27-
12 170(2)(e), it is possible that a different proposal that is less intrusive on the shoreline
13 environment may be appropriate if it is conclusively established that there is no other reasonable
14 building site on the property and he meets all of the variance criteria set forth in the WAC and
15 CCSMP. But, as proposed, this development is simply not a reasonable and appropriate use in
16 the Clark County Conservancy Environment adjacent to the Washougal River. Clark County
17 was correct to deny the variance request.

18 **[16]**

19 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
20
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BASED ON THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Board enters the following:

ORDER

The decision of Clark County denying a variance permit is **AFFIRMED**.

SO ORDERED this 23rd day of June 2006.

SHORELINES HEARINGS BOARD

WILLIAM H. LYNCH, Chair

(see concurring opinion)
KATHLEEN D. MIX, Member

ANDREA McNAMARA DOYLE, Member

JUDY WILSON, Member

DAN SMALLEY, Member

(see dissenting opinion)
GORDON F. CRANDALL, Member